

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of  
IP-Enabled Services

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WC Docket No. 04-36

**INITIAL COMMENTS OF THE  
ILLINOIS COMMERCE COMMISSION**

**I. INTRODUCTION AND SUMMARY**

Pursuant to Rule 1.415 of the Commission's rules of practice and procedure, 47 C.F.R. § 1.415, the Illinois Commerce Commission ("ICC") hereby files its initial comments in response to the Notice of Proposed Rulemaking ("NPRM") released on March 10, 2004 in the above-captioned proceeding. Specifically, the Commission seeks comment on critical issues relating to the communications services and applications that make use of Internet Protocol (IP), notably including voice over IP (VoIP) services (collectively, "IP-enabled services"). The ICC applauds the Commission for undertaking this crucial examination and submits the following comments.

The ICC believes that facilitation of the emerging VoIP technologies, services and applications should be a regulatory policy goal at both the state and federal levels. We strongly agree with the Commission's assessment that IP-enabled applications already have transformed the communications landscape, and hold great promise for even greater opportunities for both consumers and

providers in the future. The ICC endorses the following prediction advanced in the NPRM:

...as use of IP expands, the technology's transformative effect on the communications landscape will likely become only more prominent, giving rise to a "virtuous circle" in which competition begets innovation, which in turn begets more competition....[t]his competition will likely force more innovation and lower prices, resulting in more individual choice and hence even greater competition.<sup>1</sup>

The task for regulators is to see that emerging IP technologies and IP-enabled applications fulfill their potential to the greatest degree possible, while ensuring that the transition (already well underway) to broadband platforms and all that they offer, does not prematurely undermine current service arrangements still relied upon by the vast majority of customers. It is self-evident that simple extension of existing regulatory rules and practices will not suffice. It is just as evident that the critical continuing role of certain "traditional" services, if not properly recognized and addressed here, could leave a regulatory "gap". Thus, the ICC believes that while embracing the transition to new technologies, state and federal agencies must work together to ensure that certain crucial public services are not abandoned or shouldered solely by one segment of service providers.

For these, and other reasons, the ICC wishes to underscore its conviction that the Commission must fully coordinate its deliberations and decision-making in the instant rulemaking with those in the *Intercarrier Compensation* (CC Docket No. 01-92), *Wireline Broadband* (CC Docket No. 02-33), and *Universal Service*

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<sup>1</sup> *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (Mar. 10, 2004) (*NPRM*), at paragraph 22.

(CC Docket No. 96-45) rulemakings. As the Commission is aware, the reforms that must stem from these dockets are intimately and inextricably linked. Only a fully coordinated and comprehensive approach to these proceedings will accomplish the Commission's objectives. The ICC's comments here reflect the interdependencies among these three proceedings.

## **II. Categorizing IP-Enabled Services**

The Commission seeks comment on whether there is a compelling rationale for applying traditional economic regulation to providers of IP-enabled services, to the extent the market for IP-enabled services is not characterized by monopoly conditions.<sup>2</sup> The ICC sees no compelling rationale for extending the full panoply of traditional utility regulation to IP-enabled services and applications at this time. However, the ICC concurs with the NPRM's tentative assessment concerning the appropriate overall regulatory approach to IP-enabled services and applications:

, . . . other aspects of the existing regulatory framework – including those provisions designed to ensure disability access, consumer protection, emergency 911 service, law enforcement access for authorized wiretapping purposes, consumer privacy, and others – should continue to have relevance as communications migrate to IP-enabled services.<sup>3</sup>

We believe this framework would best guide the Commission's deliberations concerning possible categorization of IP-enabled services. While

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<sup>2</sup> NPRM, at paragraph 5.

<sup>3</sup> NPRM, at paragraph 5.

extension of traditional utility regulation to emerging IP-enabled services and technologies is unwarranted, there is need for rules targeted to address specific social policy concerns on some types or categories of IP-enabled services.

The Commission requests comment concerning how best to categorize IP-enabled services for purposes of appropriate application of social policy obligations (*i.e.*, to enable application of such obligations only as and where warranted).<sup>4</sup> The ICC believes that, at least for the immediately foreseeable future, these obligations can and should be restricted to VoIP services and applications. Moreover, we believe these obligations should be applied only to VoIP services and applications that are both perceived and utilized by customers as direct replacements for traditional voice telephony.

In urging this general result, we readily acknowledge “the devil is in the details”. Implementing a threshold distinction between VoIP-based replacements for traditional telephony and other IP-enabled services or applications, while straightforward in concept, is fraught with potential pitfalls in practice. We believe the Commission has enumerated several factors likely to prove useful to the required classification. We further believe that use of a single criterion for this purpose will not be sufficient; a multifaceted test will be required.

We recommend generally that the Commission minimize (to the greatest extent feasible) the use of classification mechanisms to determine differential or disparate treatment of providers, services or applications. Thus, while the Commission should distinguish between categories or types of IP-enabled services and applications (at least for the moment) to ensure appropriate

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<sup>4</sup> *NPRM*, at paragraph 35.

application of certain social policy obligations, we recommend that such classification be avoided with respect to intercarrier compensation and universal service contribution obligations.

As the Commission is well aware, no one can foresee with precision how IP-enabled services and technologies will develop. Even the best-informed guesses and projections will be wrong to some extent. This argues for caution in “drawing” regulatory lines. The act of classification itself can distort incentives, activities of market participants, and to some extent, the development path of the technology itself. Our recommendations concerning intercarrier compensation and universal service obligations for IP-enabled services, presented below, reflect these realities.

### **III. Public Safety and Disability Access**

#### **911/E911 Services**

The ICC endorses the NPRM’s assessment that:

....those provisions designed to ensure disability access, consumer protection, emergency 911 service, law enforcement access for authorized wiretapping purposes, consumer privacy, and others – should continue to have relevance as communications migrate to IP-enabled services.<sup>5</sup>

The ICC believes that the availability of enhanced 9-1-1 (E9-1-1) services (including acceptable technical variants) must be maintained as voice communications migrate to IP-enabled services. Criteria governing when and

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<sup>5</sup> *NPRM*, at paragraph 5.

how providers of IP-enabled services and applications should provision E9-1-1 services must balance crucial public safety concerns with technological realities.

The following are the ICC's suggested criteria:

- 1) E9-1-1 is required for PSTN-based VoIP applications perceived as/used by (at least some) customers as a direct replacement for "traditional" voice service. Exception is permitted only where the following 3 conditions are met:
  - a) The provider demonstrates to the FCC that deployment of E9-1-1 is technically infeasible and this requirement would forestall provision of the particular VoIP application in question;
  - b) The provider obtains FCC approval for a temporary waiver in which the provider will provision the "closest" possible alternative to E9-1-1 until technology is derived to satisfy the requirement; and
  - c) The provider provides full disclosure to customers regarding the differences between this alternative and "conventional" E9-1-1.
- 2) E9-1-1 is required for non-PSTN-based VoIP applications perceived as/used by (at least some) customers as a direct replacement for "traditional" voice services. Exception is permitted only where the following 2 conditions are met:
  - a) The provider obtains FCC approval for a temporary waiver under which the provider will provision the "closest" possible alternative to E9-1-1 until technology is derived to satisfy the requirement; and
  - b) The provider must provide full disclosure to customers regarding the differences between this and "conventional" E9-1-1.
- 3) No 9-1-1 requirements for any VoIP or other IP-enabled service or application not perceived as/used by (at least some) customers as direct replacement for "traditional" voice services.

The ICC believes if no E9-1-1 standards are placed on VoIP applications, the industry may delay provisioning of E9-1-1 emergency services (or acceptable substitutes where appropriate).<sup>6</sup> Thus, we believe that the Commission must maintain oversight of standards and deadlines regarding the implementation of E9-1-1 by providers of VoIP services. Absent such oversight, there will be insufficient incentive on the part of the industry to comply with appropriate requirements.

The ICC's recommended criteria allow for an appropriate level of technical flexibility, and would encourage implementation of E9-1-1 related technologies within the VoIP industry. In order to avoid potential confusion and inconsistency associated with individual states setting non-uniform standards, significant authority should rest with the Commission to implement criteria such as those proposed here. At the same time, the Commission must recognize and accommodate the significant need for (and advantages of) state and federal coordination and cooperation concerning E9-1-1 and IP-enabled services. Complimentary state and federal standards (and coordinated enforcement of such standards) are in the public interest. Only state requirements shown to be inconsistent with federal standards should be preempted.

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<sup>6</sup> Past history with the wireless industry and 9-1-1 suggests this may be the case. The wireless industry resisted implementing E9-1-1 protocols until the Commission required it to do so.

## **Disability Access**

The Commission seeks comment on how the disability accessibility requirements contained in Sections 255 and 251(a)(2) of the Act should be applied to any providers of VoIP or other IP-enabled services.<sup>7</sup> With regard to general accessibility requirements, the ICC recommends the following overall requirements:

- Access to Telecommunications Relay Services (TRS) should be available (through any technical means consistent with Commission requirements) for PSTN-based VoIP applications perceived as/used by at least some customers as substitutes for traditional voice services.
- Non PSTN-based VoIP applications perceived as/used by at least some customers as substitutes for traditional voice services should provide access to the TRS (through any technical means consistent with Commission requirements).
- IP-enabled services or applications not perceived as/used by customers as direct substitutes for traditional voice service should have no TRS access requirements.

As with other “social policy” obligations, the Commission should facilitate maximum coordination and cooperation between state and federal efforts to ensure appropriate disability access to services and facilities. Consistent with this, only particular state requirements concerning disability access to IP-enabled

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<sup>7</sup> *NPRM*, at paragraph 58.



services and applications shown to be inconsistent with federal standards should be preempted.

#### **IV. Inter-Carrier Compensation**

The Commission recently determined that, pursuant to its current rules, interstate access charges may be assessed on AT&T's Phone-to-Phone IP telephony service.<sup>8</sup> The Commission explicitly limited this determination to interexchange services utilizing IP transport that meet the following three criteria:

- The service uses ordinary customer premises equipment (CPE) with no enhanced functionality;
- The service originates and terminates on the public switched telephone network (PSTN); and
- The service undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.<sup>9</sup>

At the same time, the Commission emphasized that this ruling would not preclude it from "adopting a different approach when it resolves the *IP-Enabled Services* rulemaking proceeding or the *Intercarrier Compensation* rulemaking proceeding".<sup>10</sup>

The ICC believes the Commission indeed should adopt a different approach to the application of intercarrier compensation to VoIP in the instant proceeding. The ICC urges that all traffic utilizing VoIP based applications that

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<sup>8</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, FCC No. 04-97, WP No. 02-0361 (April 14, 2004) (*hereinafter*, "AT&T Order"), ¶¶ 1,15.

<sup>9</sup> The analysis in this order applies to such services regardless of whether one interexchange carrier uses IP transport or multiple service providers are involved in providing IP transport.

<sup>10</sup> *AT&T Order*, ¶ 2.

traverse or utilize the PSTN be subject to – at most – cost-based intercarrier compensation charges. The ICC recommends this result for any traffic originated or terminated on the PSTN that utilizes VoIP technology in any manner.<sup>11</sup>

Facilitation of emerging IP-enabled technologies and applications should be an overarching regulatory policy goal at both the state and federal levels. Consistent with this, if providers of any IP-enabled services are to pay some level of compensation for IP-based traffic that traverses or utilizes the PSTN, then that compensation should be at a level lower than current access charges. More specifically, compensation for such traffic should be based on a forward-looking cost standard. Current access charges generally embody implicit subsidies, and thus are set at levels that exceed economic costs.<sup>12</sup> A defining characteristic of VoIP and VoIP-like services is their potential for migrating traffic off the PSTN. Continued application of access charges, where these embody implicit subsidies, would discourage use of the PSTN by providers of VoIP services and applications. This would be true even where use of the PSTN would be more efficient than an alternative network platform. The PSTN is a valuable resource. Its use should not be discouraged by application of intercarrier compensation rates containing subsidies, even as migration to alternative platforms occurs.

In advocating this position, the ICC is mindful of the critical interrelationships between the instant rulemaking and the Commission's *Intercarrier Compensation* rulemaking proceeding. Most notably, if the

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<sup>11</sup> The ICC holds this opinion regardless of whether VoIP services are classified as telecommunications services or something else.

<sup>12</sup> This is not the case in Illinois, where SBC and Verizon both charge cost-based terminating access charges.

Commission were to replace existing intercarrier compensation mechanisms with some form of bill-and-keep as a result of the *Intercarrier Compensation* rulemaking, this particular ICC recommendation would be rendered moot. Under such circumstances, VoIP traffic, along with other types of traffic, would be relieved of existing intercarrier compensation obligations. This result obviously would be desirable from the standpoint of encouraging deployment of VoIP services and applications. On the other hand, if the Commission does not implement a form of bill and keep in the *Intercarrier Compensation* docket, it might adopt a “unified” intercarrier compensation scheme where a single rate applies to all types of traffic. If such a rate reflects forward-looking economic costs, the result could be consistent with facilitation of emerging IP technologies.

It is conceivable, however, that the Commission would retain the practice under which at least some type(s) of traffic is assessed intercarrier compensation rates embodying implicit subsidies. In such event, the ICC would continue to urge that IP-enabled traffic generally (and VoIP related traffic specifically) not be subject to such charges. In this regard, we recognize the merits of the following policy proposition propounded in the NPRM:

As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.<sup>13</sup>

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<sup>13</sup> *NPRM*, at paragraph 61.

At the same time, however, pursuit of overarching policy goals can, under certain circumstances, warrant modification of - or judicious departure from - this general principle. Facilitating nascent IP-enabled technologies and applications would be just such a case. We note that the Commission itself has recognized that this guiding principle is not, and should not be, considered immutable.<sup>14</sup>

Under these circumstances, a decision to relieve IP-enabled applications of legacy intercarrier compensation requirements would raise two significant issues. The first would be the issue of competitive neutrality. Placing the regulatory thumb on the scales to favor a particular class or type of competitor is inherently problematic. We believe, however, that such action is significantly less so when it involves not a type or class of competitor but rather a technology. In this case, all competitors and potential competitors can avail themselves of IP-enabled technologies (although admittedly some perhaps more readily than others).

A second issue is the potentially significant adverse financial impact upon existing providers of the PSTN, and ultimately their end-user customers. Decreasing reliance upon existing cost recovery mechanisms inevitably causes some dislocation and requires, at least, transitional adjustments. However, these are issues implicating the entire intercarrier compensation system, as well as the existing rules and practices aimed at preserving and promoting universal service. The Commission is, of course, addressing reform of these systems in the

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<sup>14</sup> A case in point is the exemption of enhanced services providers from obligations to pay certain interstate access charges.

*Intercarrier Compensation* (CC Docket No. 01-92), *Wireline Broadband* (CC Docket No. 02-33), and *Universal Service* (CC Docket No. 96-45) rulemakings.

Finally, the ICC is aware of the view that “true” VoIP services are provided only via broadband connection and platforms, and offer service enhancement to end-user customers (as compared to traditional circuit-switched telephony). We find that such views have merit. We do not, however, advocate or favor any approach that would require categorization of VoIP traffic (or IP-enabled traffic generally) for purposes of determining appropriate intercarrier compensation for use of the PSTN. It is axiomatic that regulatory classification schemes are particularly problematic when applied to nascent and dynamic technologies. As previously noted, a classification scheme distinguishing between “types” of IP-enabled services and applications is needed to ensure appropriate application of certain social policy obligations. However, the ICC believes that such classification should be avoided to the degree possible with respect to intercarrier compensation (as well as determination of universal service contribution obligations). The incentives and potential rewards to providers for regulatory arbitrage and gaming are sufficiently large that the underlying purposes of the classification scheme are likely to be frustrated. For example, aspects of protocol conversion(s), including the location and number of such conversion(s), may be determined not by imperatives of technical or market efficiency, but in response to regulatory classification.

## **V. Universal Service**

The Commission seeks comment on how the regulatory classification of IP-enabled services, including VoIP, might affect its ability to fund universal service.<sup>15</sup> The Commission also asks for comment on specific questions concerning the potential universal service obligations of both facilities-based and non-facilities-based providers of IP-enabled services.

As an initial matter, the ICC recognizes that, under most likely scenarios, its recommendations concerning intercarrier compensation for IP-enabled traffic would result in reductions to existing streams of support for interstate universal service support programs. More fundamentally, as the Commission clearly recognizes, migration of existing traffic to IP-enabled services and applications (regardless of the specific platform utilized by IP-enabled providers) carry the potential to significantly undermine existing levels of support for universal service. As consumers increasingly utilize non-traditional communications platforms, there is need, at least for some potential transitional period, for a fundamental revamping of universal service support process and mechanisms.

It is the ICC's belief that the existing contribution base of support for universal service must be, and properly should be, broadened. We note that the Commission currently is considering one such possibility with respect to facilities-based providers of broadband Internet access services (potentially including ISPs as well as wireline telecommunications carriers).<sup>16</sup> Consistent with this

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<sup>15</sup> *NPRM*, at paragraph 63.

<sup>16</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3020-21.

belief, the ICC recommends the Commission find in the instant proceeding that, as a matter of sound public policy, providers of IP-enabled services whose traffic traverses or utilizes the PSTN - whether facilities-based or non-facilities-based - should participate in funding universal service support mechanisms.<sup>17</sup> We believe this general assessment is shared by significant segments of the industry, as illustrated, for example, by some recent comments of Comcast President and CEO Brian Roberts:

Comcast Corp. is "prepared to step up to important social responsibilities like universal service" if policy-makers devise a "clear, strong, deregulatory policy" for voice-over-Internet protocol services, Comcast's president and chief executive officer, Brian L. Roberts, told lawmakers today.<sup>18</sup>

The ICC further believes that competitive equity considerations and the benefits of widely and properly diffusing responsibility for supporting universal service argue, at least for some time period, for both wireline and non-wireline broadband platform providers to participate in the support of universal service.

These general policy prescriptions raise several specific issues regarding application and implementation that will require careful resolution. For example, whether these applications might best be accomplished via some variant of current methodologies (based on end-user revenues), alternative mechanism(s) based on connections to the public network, other alternative mechanism(s), or even some combination of these requires intense scrutiny of the type currently

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<sup>17</sup> How non-facilities-based carriers might indirectly contribute to support of universal service is a topic addressed in the *Wireline Broadband NPRM*.

<sup>18</sup> "Telecom Heavies Push Policy Objectives," Telecommunications Reports Daily, May 12, 2004.

underway in the Contribution Methodology NPRM. The scope of that investigation might need to be widened.

Additionally, the Commission already is grappling with questions surrounding its permissive authority to require support for universal service programs. Every decision to broaden the base of support for these programs, however sound from a public policy perspective, may complicate these questions.

## **VI. Consumer Protection**

The ICC believes that VoIP services and applications perceived as/used by customers as direct replacements for traditional POTS should be subject to certain basic consumer protection provisions regardless of whether such VoIP services are PSTN-based or non-PSTN-based. We reiterate our view that, particularly with respect to “social policy” obligations, maximum coordination and cooperation between state and federal efforts is in the public interest. The ICC believes that many states have in place consumer protection provisions that will readily complement federal provisions determined to be appropriate for VoIP applications and services. To illustrate this, we note our specific recommendation that the FCC’s Anti-Slamming<sup>19</sup> and Truth in Billing<sup>20</sup> rules should apply to such VoIP services and applications. We note further that the following two Illinois statutes specifically address slamming and cramming issues:

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<sup>19</sup> 47 CFR 64.1100 – 64.1190.

<sup>20</sup> 47 CFR 64.2401.



- 220 ILCS 5/13-902 – Illinois Anti-Slamming Law protects customers both from unauthorized changes in their chosen telecommunications carrier(s) and also from unreasonable delays in authorized changes in chosen carrier(s).
- 220 ILCS 5/13-903 – Illinois Anti-Cramming Law prevents carriers from billing customers for monthly recurring products and services they did not authorize. It further requires that carriers that collect on behalf of other parties must remove any alleged cramming charges from their bills upon notice from customers.

We believe these statutes effectively complement the Commission's rules concerning slamming and cramming. We further believe that many specific state consumer protection provisions will be fully complementary and consistent with the federal consumer protection requirements appropriately applied to VoIP services and applications. Only those state provisions shown to be inconsistent with federal standards and requirements for VoIP applications should be preempted.

## **VII. CONCLUSION**

WHEREFORE, for the reasons set forth above, the ICC respectfully requests that the Commission consider these comments and adopt the recommendations contained herein before issuing the Final Rule in this proceeding.

Respectfully Submitted,

*/s/ Christine F. Ericson*

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